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No. 08-576

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In The
Supreme Court of the United States

FIN-AG, INC.,

Petitioner,

v.

PIPESTONE LIVESTOCK AUCTION MARKET, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH DAKOTA

SUPPLEMENTAL BRIEF OF PETITIONER

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QUESTION PRESENTED

The decision of the South Dakota Supreme Court in this case conflicts irreconcilably with an authoritative decision of the Minnesota Supreme Court on the proper interpretation of a provision of the federal Food Security Act of 1985 ("FSA"), 7 U.S.C. § 1631, giving rise to the following question presented: Whether a commission merchant or other purchaser of farm products is protected by the FSA when the debtor sells secured farm products using a fictitious name that is neither registered nor listed in the UCC/EFS filing system with the state.

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RESPONSE TO THE BRIEF OF THE UNITED STATES AS AMICUS CURIAE

Petitioner files this supplemental brief in response to the Brief for the United States as Amicus Curiae ("Am. Br."). Contrary to the position of the United States, the decision below conflicts squarely with the decision of the Minnesota Supreme Court in *Fin-Ag, Inc. v. Hufnagle, Inc.*, (Pe t App. A-113) ("*Hufnagle*").[1] Both cases involve "fronting" sales of secured collateral, and the factual distinction the United States draws between the kinds of "fronts" in the two cases is irrelevant, not only for purposes of interpreting section 1631 of the Food Security Act ("FSA"), 7 U.S.C. § 1631, but also the outcome of this controversy. Regardless of whether the "front" sells under his own name (as in *Hufnagle*) or under the name of a d/b/a (as here), the governing statute compels the same conclusion. Section 1631 does not distinguish between different kinds of fronting transactions, and the only way different fronting transactions may be treated disparately under the statute is through conflicting interpretations of the same statutory text – precisely the situation here – thus warranting certiorari review.

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[1] There are actually three decisions below, each interpreting section 1631 in the same way. Accordingly, for ease of reference, this Supplemental Brief treats the three decisions as a single decision.

The decision below also conflicts with this Court's precedents on the appropriate method for interpreting federal statutes. As this Court has explained, the same term appearing in the same Act ordinarily should be given the same meaning. In order to reach its conclusion below, however, the South Dakota Supreme Court interpreted the term "seller" used multiple times in section 1631 to mean two contradictory things. Specifically, in one instance where the term "seller" appears, the court below held that the term means the fronting d/b/a, yet in another place where the same term appears, the court held it does not mean the fronting d/b/a, but rather the actual owner of the collateral. The statute cannot bear this construction under this Court's interpretive methodology, and the United States errs in suggesting that it may.

It is also irrelevant whether South Dakota has enacted a regulation implementing the FSA that differs from those of other States. Although the court below cited the regulation to support its conclusion that a fronting d/b/a is a "seller" for purposes of concluding that respondents failed to receive notice of Fin-Ag's security interest (because the d/b/a was not listed in the central filing registry), the court below did not cite or rely on the regulation in resolving the dispositive question here: whether the d/b/a is also the "seller" for purposes of section 1631(d)'s applicability only to security interests "created

by the seller." That is because the South Dakota regulation has no bearing on the resolution of this dispositive issue. If a debtor uses a d/b/a to front a sales transaction involving farm products, and the d/b/a is not listed on an effective financing statement, the "created by the seller" limitation of section 1631 applies in exactly the same way to a d/b/a fronting sale whether or not the State requires the listing of the d/b/a.

Contrary to the view of the United States, controversies over fronting transactions are common and recurring. Moreover, the decision below exacerbates the problem because it encourages unscrupulous debtors seeking to "front" sales of farm products to adopt the type of "front" at issue below. The statute now also suffers from non-uniform application, which is precisely what Congress hoped to overcome when it enacted section 1631 to replace a hodgepodge of non-uniform state law rules governing the same subject. The only way to resolve the controversy over the correct interpretation of section 1631 is for this Court to intervene. Accordingly, certiorari should be granted.

I. The Decision Below Conflicts Squarely with *Hufnagle*.

In *Hufnagle*, the Minnesota Supreme Court concluded that the term "seller" appearing multiple times in section 1631 means the same

thing each time it appears (*e.g.*, if the fronting entity is the "seller" for one purpose, it is the seller for all purposes under the statute). In the decision below, the South Dakota Supreme Court concluded that the term "seller" can mean different things each time it appears (*e.g.*, although the fronting entity may be the "seller" for some purposes, it may not be the seller for others). That conflicting view of the statute is the dispositive crux of this controversy. If the Minnesota Supreme Court is correct, the decision below cannot be, and *vice versa*. The conflict among the courts is thus square (both involve fronting sales, and both cannot be correct). It is also dispositive: if the Minnesota Supreme Court is right in its interpretation of the term "seller," respondents lose; if the South Dakota Supreme Court is right, they win.

Section 1631(d) provides in relevant part that "a buyer who in the ordinary course of business buys a farm product from a seller engaged in farming operations shall take free of a security interest *created by the seller*." 7 U.S.C. § 1631(d) (emphasis supplied). Thus, unless one of the provisions of sections 1631(e) or (g) applies (specifying circumstances in which a buyer will *not* take free, such as when the buyer has notice of a security interest the seller granted to a creditor because it is listed on the central filing registry), a buyer of farm products takes free of a security interest in the farm

products, but only if the "seller" created the security interest. In other words, section 1631(d) does not release a security interest created by someone other than the "seller."

In *Hufnagle*, a farmer ("Buck") habitually sold corn to a grain merchant ("Meschke"). Because Buck had granted a lien on his corn crop to a secured lender ("Fin-Ag"), Meschke typically paid for the corn by delivering a check to Buck made out jointly to Buck and Fin-Ag. That way, Fin-Ag was assured of payment because, by himself, Buck could not negotiate the check. Meschke understood that Fin-Ag held a lien on the corn because Buck's name was listed in the State's central filing system as a seller whose grain was subject to Fin-Ag's lien.

To avoid having to pay Fin-Ag the proceeds of certain sales, Buck "fronted" the sales of some corn by having his minor children and certain employees (collectively, the "Tookers") "sell" the corn to Meschke. The Tookers delivered the corn to Meschke, and Meschke paid the Tookers for it without issuing a joint payee check. The funds from the sale, however, ended up in Buck's bank account, and Fin-Ag went unpaid. Reviewing this situation and whether Meschke took free of Fin-Ag's security interest, the Minnesota Supreme Court concluded that, regardless of whether the Tookers were Buck's undisclosed agents, "commission merchants," "selling

agents," or outright owners of the corn selling it on their own behalf, Buck did not take free of the security interest.

The court reasoned that, if the Tookers were Buck's undisclosed agents, then Buck was the "seller" and Meschke did not take free because Buck was listed on the central registry. If the Tookers were "commission merchants" or "selling agents," Meschke did not take free because the Tookers were not registered with the State as such. If the Tookers owned the corn and sold it to Meschke in their own right, Meschke still did not buy the corn free of Fin-Ag's security interest. Under this possibility, although the Tookers were the "sellers," the Tookers did not create the security interest – Buck did. (Pet App. A-126-128). Accordingly, when Meschke bought the corn from the Tookers, he could not take free of Fin-Ag's security interest because it was not "created by the seller" (*i.e.*, the Tookers) as section 1631(d) requires. The *Hufnagle* court properly construed the term "seller" to mean the same thing throughout the statute.

In the present case, two farmers ("Berwald Brothers") habitually sold livestock through certain auctioneers ("Sale Barns"). Because Berwald Brothers had granted a lien on their livestock to a secured lender ("Fin-Ag"), the Sale Barns should have paid for the livestock by delivering a check to Berwald Brothers made out

jointly to Berwald Brothers and Fin-Ag. That way, Fin-Ag would have been assured of payment because, by itself, Berwald Brothers could not negotiate the check. The Sale Barns understood that Fin-Ag held a lien on the livestock because Berwald Brothers' name was listed in the State's central filing system as a seller whose livestock was subject to Fin-Ag's lien.

To avoid having to pay Fin-Ag the proceeds of certain sales, Berwald Brothers "fronted" the sale of some livestock by having a d/b/a ("C&M Dairy") "sell" the livestock to the Sale Barns. Specifically, C&M Dairy delivered the livestock to the Sale Barns, and the Sale Barns paid C&M Dairy for the livestock sales without issuing a joint payee check. The funds from the sales, however, ended up in Berwald Brothers' bank account, and Fin-Ag went unpaid. Reviewing this situation and whether the Sale Barns took free of Fin-Ag's security interest, the South Dakota Supreme Court concluded that the Sale Barns *did* take free. The court reasoned that, although C&M Dairy was the "seller" for purposes of concluding that respondents should have received notice of Fin-Ag's security interest, C&M Dairy was not the "seller" for purposes of applying the limitation set forth in section 1631(d) permitting the Sale Barns to take free only of a security interest "created by the seller." In reaching this conclusion, the court below

expressly rejected the Minnesota Supreme Court's analysis in *Hufnagle*. (Pet App. A-25) ("we disagree with *Hufnagle's* 'created by the seller' legal analysis").

The United States argues that the incongruity between the decision of the court below and *Hufnagle* does not present a square conflict because the decision below was "limited to" a d/b/a fronting situation, whereas *Hufnagle* involved individuals acting as fronts either as agents, commission merchants, selling agents, or owners. Am. Br. at 16-17. But the United States never explains *why* this distinction makes a difference, and the reason for this omission is clear – the distinction makes no difference at all and is simply an empty formalism.

The United States suggests further that another possibly distinguishing feature between the two cases may be that, in *Hufnagle*, it may have been the case that the parties colluded to deprive the secured lender of the proceeds of its collateral, whereas that did not appear to be the case here. Am. Br. at 17. This possible distinction, however, is also one without a difference. The statute makes no exception or qualification for "collusion," and neither the decision below nor the decision in *Hufnagle* turned on this point.

II. South Dakota's Regulation Regarding the Listing of D/b/a's Is Irrelevant to the Resolution of the Conflict Between the Decision Below and *Hufnagle*.

The United States contends that South Dakota is alone among the States in directing that d/b/a's be listed along with the name of the owner of the collateral. Am. Br. at 11-12. But even if true, this is also a distinction without a difference. Although the court below reasoned that a d/b/a may be a "seller" for purposes of determining whether respondents failed to receive notice of Fin-Ag's security interest because the d/b/a was not listed in the centralized filing system, and cited the regulation as supporting that conclusion, (Pet. App. A-19-20), the dispositive controversy is over the court's treatment of the d/b/a as a seller for one part of section 1631, but not another. On this point, the regulation is irrelevant.

Regardless of whether C&M Dairy was the "seller" of the livestock for purposes of determining whether respondents had notice of Fin-Ag's security interest, and regardless of whether Fin-Ag was obligated to list C&M Dairy in its effective financing statement, respondents still lose if C&M Dairy was *also* the "seller" for purposes of the "created by the seller" limitation of section 1631(d) because C&M Dairy did not create Fin-Ag's security interest – Berwald

Brothers did. And the question whether C&M Dairy was the seller for purposes of the statute's "created by the seller" limitation turns, of course, on whether the term "seller" means the same thing throughout the statute.

III. The Decision Below Conflicts with this Court's Precedents Regarding the Interpretation of the Same Term Appearing in Different Parts of the Same Statute.

The United States acknowledges the oddity of the interpretive method embraced by the court below. It concedes that "[p]etitioner is correct that the state court's application of the term 'seller' in the 'created by the seller' limitation was not entirely congruent with its analysis of the 'seller' in the notice exception." Am. Br. at 14. Likewise, the United States acknowledges the general rule that a statutory term "'should ordinarily retain the same meaning wherever used in the same statute.'" *Id.* (quoting *NASA v. FLRA*, 527 U.S. 229, 235 (1999)). Having conceded these points, however, the United States proceeds with an unpersuasive effort to justify the incongruity. Ultimately, its effort only underscores the importance of the problem and the need for this Court's review.

The United States invokes the idea that words used repeatedly in the same statute may

sometimes have different meanings. Am. Br. at 14-15 (citing and quoting *Environmental Def. v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007); *Atlantic Cleaners & Dryers, Inc. v. United States*, 286 U.S. 427, 433 (1932)). That concept, of course, is true generally, but has no application here. Although the "same meaning" canon is not "rigid," it should yield only when "there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent." *Environmental Def.*, 549 U.S. at 574. Review of section 1631 reveals that the word "seller" is used in precisely the same manner throughout the text. Furthermore, there is no indication in the legislative record that Congress intended "seller" to be defined or applied differently in the various places it appears in the section.

The United States counters that the term "seller" as used in different parts of section 1631 is actually used in "two different contexts," and that these distinct contexts direct different interpretations of the same term. Am. Br. at 15. But this view is simply not plausible. As the United States concedes, in most situations the *same* entity will be the seller in both contexts (*i.e.*, in transactions that do not involve "fronting" sales). *Id.* It is only in the fronting context that the court below concluded that the

term "seller" may, in fact, have a different meaning in different parts of the same statutory provision. But there is no evidence that Congress intended a different meaning of the term "seller" only in a context (fronting) in which doing so would serve to facilitate a species of fraud. Such an interpretation of a federal statute in direct conflict with a decision of another state court of last resort warrants certiorari review.

IV. Fronting Is a Recurring Problem, and the Decision of the Court Below Exacerbates the Problem and Defeats Congress' Expectation of Creating a Uniform Rule.

The "fronting" problem at issue in this case and in *Hufnagle* are commonplace and recurring. *See, e.g., Cofina Fin. LLC v. Beck*, Civ. No. 09-450 (Fifth Jud. Cir. S.D.) (sale of crops and cattle under name of family trust); *Cofina Fin., LLC v. Murphy, et al*, Civ. No. 08-263 (Third Jud. Circuit S.D.) (sale of corn under minor son's name). The fact that fronting cases are not often litigated up to the State Supreme Court level, or result in many published decisions, does not demonstrate that the problem is uncommon. If the problem were uncommon or insignificant, Petitioner would not have litigated the matter to the South Dakota Supreme Court, nor sought this Court's review.

Moreover, the fact that the Farm Services Agency ("FSA") and the Commodity Credit Corporation ("CCC") report little experience with the problem is unsurprising. Dodson, *Evaluating the Relative Cost Effectiveness of the FSA's Farm Loan Programs*, USDA Report to Congress 17 (2006) (such programs represent 3-4% of U.S. farm debt). FSA largely issues guarantees for loans made by private lenders. Farm Loans, USDA FACT SHEET 1 (Jan. 2009). CCC does not typically participate in the kind of loans at issue. Rather, CCC largely administers a type of commodity hedge that permits farmers to fix a floor price for their crops by either selling their harvested crops in the open market (if the market price is higher than the price fixed previously by CCC) or surrendering their crops to CCC (if the market price is less than the price fixed previously by CCC). Commodity Credit Corp., USDA FACT SHEET 1 (Nov. 1999).

More important, the decision below creates an erroneous and unfortunate precedent that will serve only to promote fronting transactions. So long as the debtor conducts the transaction under the name of an unregistered d/b/a, the buyer is encouraged to purchase the collateral, pay the debtor the proceeds, and leave the secured party unpaid with impunity. In contrast, if the debtor conducts the transaction under the name of a unregistered relative, employee, separate corporate entity,

partnership, or trust, the result is different. That cannot be a correct statement of the law because there is no warrant under the statute for elevating the form of the transaction over its substance.

Finally, prior to the enactment of section 1631, States had enacted a patchwork of inconsistent rules governing sales of farm products encumbered by security interests. *See Hufnagle*, (Pet. App. A-115-116). In response, Congress enacted section 1631 to streamline the relevant rules and render them uniform. *Hufnagle*, (Pet. App. A-116-117). The decision below defeats this effort by establishing in South Dakota an interpretation of section 1631 at war with that of the Minnesota Supreme Court in *Hufnagle*, creating non-uniform standards for fronting transactions. Only this Court can restore the uniformity Congress intended.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition, the Court should grant certiorari in this matter.

Respectfully submitted,

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